Office - Supreme Court, U.S.
FILED
DEC 6 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-614

In The

Supreme Court of the United States

October Term, 1982

CHARLES M. REBHAN and
CORAL GABLES IMPORTED MOTORCARS, INC.,
Petitioners,

—vs.—

FIAT MOTORS OF NORTH AMERICA, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

WOODROW M. MELVIN, JR.
(Counsel of Record)
One Biscayne Tower, Suite 2020
Miami, Florida 33131
(305) 371-6262
Attorney for Respondent
Fiat Motors of North America, Inc.

ROBERT I. FISHER
JAMES M. BRACHMAN
JACK M. BATTAGLIA
Of Counsel

December 3, 1982

DESIGNATION OF CORPORATE RELATIONSHIPS

Respondent Fiat Motors of North America, Inc. ("Fiat Motors"), is and always has been a corporation organized under the laws of the State of New York. Petitioners' characterization (in its "List of Parties") of Fiat Motors as a New Jersey corporation is incorrect.

The parent corporation of Fiat Motors is Fiat Auto International Holding B.V. The latter corporation is owned by Fiat Auto S.p.A., which is in turn owned by Fiat S.p.A.

Fiat Motors has no subsidiaries. It has the following affiliates: ABC-Telettra Telecomunic. S.A., Agriful S.p.A., A.I.F.O. S.p.A., ALSA S.p.A., A.M.C.E., Aspera S.p.A., Attivita Immobiliari S.p.A., Autogestioni S.p.A., Berto-Lamet Impes S.p.A., Bioengineering Int. B.V., Borini Prono Ltd., Carr Emiliana Orlandi S.p.A., Carter Weber Inc., Castagnetti S.p.A., Caster S.p.A., Cavis S.p.A., C.C.A. S.A., Centro Ricerche Fiat S.p.A., C.I.S. S.p.A., Comau S.p.A., Comind S.p.A., Comind Sud S.p.A., Comp. Generale Accumul. S.p.A., Deutsche Fiat G.m.b.H., Editrice La Stampa S.p.A., Ferrari S.p.A., Ferrosud S.p.A., Fiat Agricola S.A., Fiat Agriculture Ltd., Fiat-Allis Baum G.m.b.H., Fiat-Allis B.V., Fiat-Allis Canada Ltd., Fiat-Allis C.M. Ltd., Fiat-Allis Europe S.p.A., Fiat-Allis Inc., Fiat-Allis Lat. Americana S.A., Fiat-Allis France M.T.P.S.A., Fiat-Allis N. America Inc., Fiat-Allis Pty. Ltd., Fiat-Allis U.K. Ltd., Fiat Auto Belgio S.A., Fiat Auto France S.A., Fiat Automobil A.G., Fiat Automoveis S.A., Fiat Automotive Ind. Ltd., Fiat Automoviles Venezuela S.A., Fiat Aviazione S.p.A., Fiat Carrelli Elevatori S.p.A., Fiat Concord S.A., Fiat Credit France S.A., Fiat Diesel Brasil S.A., Fiat Do Brasil S.A., Fiat Engineering S.p.A., Fiat Ferroviaria Savigliano S.p.A., Fiat Finance Co. B.V., Fiat France S.A., Fiat Hispania S.A., Fiat Kredit Bank G.m.b.H., Fiat Landmasch. G.m.b.H., Fiat Lubrificanti S.p.A., Fiat Materfer S.A. Argentina, Fiat Materiel Agricole S.A., Fiat of Australia Pty. Ltd., Fiat Tractores S.A., Fiat Trattori S.p.A., Fiat T.T.G. S.p.A., Fiat USA Inc., Fiat Vehiculos Ind. S.A. Arg., Fiat Veicoli Industriali S.p.A., Fiav C.A., Fidis S.p.A., Finanz. Valtur S.p.A., Fin-Comau S.p.A., F. It. Magneti Marelli

S.p.A., Fitur S.p.A., Flexider Benelux B.V., FMB S.A., F.M. Fabbrica Molle S.A., Fratelli Borletti S.p.A., Getti Speciali S.p.A., Gilardini Do Brasil S.A., Gilardini International Ltd., Gilardini S.p.A., Gilardini Sud S.p.A., Gilby S.p.A., Grandes Mot. Diesel S.A., Hesston Corp., Icis S.p.A., IFA S.p.A., Il Nuovo Castoro S.p.A., Impregilo S.p.A., Impremoviter S.p.A., Impresit Bakolori Ltd., Impresit Costruz. S.p.A., Impresit Int. B.V., Impresit Sideco S.A., Impresit S.p.A., Itedi S.p.A., Italiana Ediz., Iveco B.V., Iveco (U.K.) Ltd., I.V.I. S.p.A., I.V.I. Sud S.p.A., Laverda S.p.A., Magirus Deutz A.G., Motransa S.A., O.Me.Ca. S.p.A., Ph-Publihertz S.r.l., Prosidea Acciai S.p.A., Publikompass S.p.A., Rifometal Alluminio S.p.A., Rockwell C.V.C. Omevi S.p.A., S.A.M.M. S.p.A., Sava Leasing S.p.A., Sava S.p.A., Saxonia A/S, Scui S.p.A., Sepa S.p.A., Sepi Metuflex S.A., S.E.S. S.p.A., Sevel S.A., Sevel S.p.A., Sifind S.p.A., Sima S.p.A., Simit S.p.A., Sirma S.p.A., Sita S.p.A., Sorin Biomedica S.p.A., Stirling Int. C.E. B.V., Teksid Acciai S.p.A., Teksid Inc., Teksid S.p.A., Tellettra Argentina S.A., Tellettra Espanola S.A., Tellettra Int. S.A., Telettra Norge A.S., Telettra S.p.A., Tofas A.S., Tractor Fiat S.A., Turbo Union Ltd., Tubi Meriflex S.p.A., Turk Tractor A.S., UFI S.p.A., Unic S.A., U.T.S. S.p.A., Ventana S.p.A., Weber Carbur. Int. B.V., Weber S.p.A., Wecarbras S.A., and Iveco Trucks of North America, Inc.

TABLE OF CONTENTS

	Page
Designation of Corporate Relationships	i
Table of Contents	iii
Table of Authorities	iv
Counterstatement of the Opinions Below	1
Counterstatement of Facts	3
Summary of Argument	11
Argument—The Eleventh Circuit's Reversal of the Judgments Raises No Colorable Seventh Amendment Issue and is Entirely Consistent with the Decisions of This Court and the Courts of Appeals	12
A. Introduction	12
B. The Eleventh Circuit Correctly Ruled that, as a Matter of Law, Fiat Motors had Established its Affirmative Defenses of Release and Waiver	12
C. The Eleventh Circuit's Disposition of this Action Does Not Raise any Colorable Seventh Amendment Issue	18
Conclusion	21

TABLE OF AUTHORITIES

Page(s)

Cases

Atlantic and Gulf Stevedores, Inc. v. Ellerman Lines, Ltd., 369 U.S. 355 (1962) 20

Benn v. Key West Propane Gas Corp., 72 So.2d 910 (Fla. 1954) 17

Boeing Co. v. Shipman, 411 F.2d 365 (5th Cir. 1969) 16, 19

Bryant v. Liberty Mutual Insurance Co., 407 F.2d 576 (4th Cir. 1969) 19

Dimick v. Schiedt, 293 U.S. 474 (1935) 20

Duffy Theatres, Inc. v. Griffith Consol. Theatres, Inc., 208 F.2d 316 (10th Cir. 1953) 13

Fabert Motors, Inc. v. Ford Motor Co., 355 F.2d 888 (7th Cir. 1966) 13, 14

Galloway v. United States, 319 U.S. 372 (1943) 20

Harpold v. Stock, 65 So.2d 744 (Fla. 1953) 17

Holmes v. Oxford Chemicals, Inc., 672 F.2d 854 (11th Cir. 1982) 16

Kohen v. H.S. Crocker Co., 260 F.2d 790 (5th Cir. 1958) 14

LaBeach v. Beatrice Foods Co., 461 F. Supp. 152 (S.D.N.Y. 1978) 13, 14

Neely v. Martin K. Eby Construction Co., 386 U.S. 317 (1967) 18, 20

New England Merchants National Bank v. Rosenfield, 679 F.2d 467 (5th Cir. 1982) 16

Padgett v. Lewis, 54 Fla. 177, 45 So. 29 (1907) 17

Price v. Airlift International, Inc., 181 So.2d 549 (Fla. 3d DCA 1966) 17

Pullman-Standard v. Swint, ____ *U.S.* ____, *102 S.Ct. 1781 (1982)* *18*

Ralston Purina Co. v. Hobson, 554 F.2d 725 (5th Cir. 1977) 16

Redel's Inc. v. General Electric Co., 498 F.2d 95 (5th Cir. 1974) 13, 14

Three Rivers Motors Co. v. Ford Motor Co., 522 F.2d 885 (3d Cir. 1975) 13, 14

United States v. Generes, 405 U.S. 93 (1972) 17

	Page(s)
United States Constitution	
Seventh Amendment	11, 12, 18, 20
Florida Statute and Rule	
Fla. Stat. § 320.642	4
Fla. Admin. Code, Rule 15C-1.08 of Florida Department of Highway Safety and Motor Vehicles	4, 7

No. 82-614

In The

Supreme Court of the United States

October Term, 1982

CHARLES M. REBHAN and
CORAL GABLES IMPORTED MOTORCARS, INC.,
Petitioners,

—vs.—

FIAT MOTORS OF NORTH AMERICA, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COUNTERSTATEMENT OF THE OPINIONS BELOW

The appendix to the petition does not accurately reproduce the opinions of the Eleventh Circuit. The alterations in the text of the appellate court's original opinion create the misleading impression that it was only on rehearing that that court held that Mr. Rebhan had waived the claims based on fraud. This misleading impression is reinforced by petitioners' description

of the court's action on rehearing.[1] As a result, it is made to appear that on rehearing the Eleventh Circuit "re-examined the facts" and, without any discussion or authority, found a waiver as to Mr. Rebhan. On the contrary, as is clear from the actual text (App. A below), the Eleventh Circuit held in its original opinion that Fiat Motors had established its affirmative defense of waiver, as a matter of law, as to *both* petitioners and for the same reasons. This holding was in no way affected by the opinion on rehearing.

The Eleventh Circuit's original opinion, 673 F.2d 1234, was composed of a Part I entitled "Facts" and a Part II entitled "Release and Waiver". Part II contained eight paragraphs. In the first six paragraphs, the court held that *both* Gables and Mr. Rebhan had released Fiat Motors from liability on all claims asserted. In the seventh paragraph, the court held that *both* Gables and Mr. Rebhan had waived the claims based on fraud. The eighth (and last) paragraph commenced, "Because we hold that appellees' claims were effectively precluded by the release and waiver . . ."[2]

In its opinion on rehearing,[3] 680 F.2d 105, the Court of Appeals modified the *first six paragraphs* of Part II of the original opinion by changing all references to the appellees to read "appellee Gables". The last paragraph of the original

---

[1] "By timely petition for rehearing Rebhan and Gables apprised the Eleventh Circuit, *inter alia*, that the release which it held barred Rebhan's individual claims could not, as he was not a party to the second franchise agreement, with which position the Eleventh Circuit agreed; however, the court went on to hold that Rebhan had waived his claim for fraudulent representation." Pet. at 5-6 (Footnote omitted); "As a result of the Petition for Rehearing filed by Gables and Rebhan, the Eleventh Circuit, at 680 F.2d 105, redetermined the facts presented to the jury to find that Gables released all its claims but that Rebhan had waived his claim of fraudulent representation." Pet. at 18-19 n.29.

[2] This last paragraph of the original opinion does not appear in petitioners' appendix.

[3] The opinion on rehearing, as reproduced in petitioners' appendix, is not complete. See Appendix B below.

opinion was modified to reflect the holdings that "Gables' claims were effectively precluded by the release and waiver" and that "Rebhan waived his claim of fraudulent representation". The *seventh paragraph* of Part II of the original opinion, which dealt with waiver, *was not modified.* Therefore, that paragraph, as reproduced at A16-17 of the petitioners' appendix, should read "appellees" rather than "Appellee Gables".

COUNTERSTATEMENT OF FACTS

At trial, petitioners (plaintiffs below) introduced various evidence attempting to support recovery against Fiat Motors upon any one or more of the following theories:

1. That Fiat Motors induced petitioners to enter into a Fiat franchise agreement by falsely representing that Gables would qualify for an automobile dealer's license under Florida law as a "replacement" dealer.

2. That Fiat Motors negligently represented to petitioners that Gables would qualify as a "replacement" dealer with the Florida Department of Highway Safety and Motor Vehicles.

3. That Fiat Motors orally promised to "take care of" all of the business "losses" incurred by Gables during the period from the opening of the dealership to the date the license application-and-hearing process was successfully completed (a period which turned out to be about 3½ months), and that Fiat Motors breached this oral agreement.[4]

The legal role played by the Florida Department of Highway Safety and Motor Vehicles was critical, and that role

[4] The complaint also alleged that Fiat Motors was somehow liable to each petitioner for "promissory estoppel". Petitioners never suggested that any particular evidence supported this theory, but they did not abandon it either. Ultimately, the jury was charged that petitioners could recover on this theory, but the jury was not given any instruction as to the essential legal elements required for recovery.

arises from the impact on this case of Section 320.642 of the Florida Statutes and the Department's Rule 15C-1.08.

Section 320.642 (Defendant's Trial Exhibit ("DX") 111) is headed "Dealer licenses in areas previously served." The section requires the Florida Department of Highway Safety and Motor Vehicles to deny an application for a motor vehicle dealer's license in any "community or territory" where the presently licensed dealers have complied with their agreements with their distributor and where those dealers are providing adequate representation for the particular make at issue. (DX-111).

In promulgating its Rule 15C-1.08 (DX-25), the Florida Department of Highway Safety and Motor Vehicles took pains to make clear that a prospective dealership could not acquire vested rights to a license until the departmental procedures had run their course. Thus, the caption of the Rule termed the prospective dealer's initial written application a "preliminary filing" of a license application. The text, in repeating this characterization, contained a prohibition against "acquiring building and facilities" during the pendency of the preliminary filing. Continuing, the text of the Department Rule required the Department to serve notices upon the presently licensed dealers for the same make of car in the relevant community or territory in order to give them an opportunity to be heard on the matters specified in Section 320.642. At least in part, the judgments entered by the District Court imposed on Fiat Motors the consequences of petitioners' disregard of the prohibition against premature financial commitment—a prohibition which existed for their protection.

In February 1975, Fiat Motors' representatives visited the office of the director of the division of the Florida Department of Highway Safety and Motor Vehicles which granted and denied dealer licenses in Florida. (Tr. 953; see Tr. 413). The purpose of the visit was to learn how the statute was administered. (Tr. 879-80, 953).

This government official explained that surrounding dealers in a make are advised by the Department of a pending application for a license to sell the same make and are given the opportunity to protest the issuance of the license. If a protest is lodged, the State of Florida convenes a hearing, following which the application is granted or denied. However, it was explained that the State would not entertain protests from any surrounding dealer where the proposed licensee would be a "replacement" for a prior dealer. (DX-75).

As of December 1974, Orange Motors of Coral Gables had been a licensed Fiat dealer in Coral Gables, and Orange Motors of Miami had been a licensed Fiat dealer in Miami. Both had ceased to be licensed Fiat dealers by early 1975. (PX-31, p.2).

On March 24, 1975, Fiat Motors advised the Florida Department of Highway Safety and Motor Vehicles that it had franchised Autorico, Inc., as a Fiat dealer in Miami. (DX-30). Two days later, Fiat Motors advised the Department that it had franchised Hebert Oldsmobile as a Fiat dealer in Homestead, Florida.[5] (DX-31). Both these dealers were licensed by the Department. (See Tr. 419, 421). Therefore, in April 1975, the trading area previously serviced by Orange Motors of Coral Gables did not have a Fiat dealer. (PX-31, p. 3).

The individual plaintiff, Mr. Rebhan, founder and sole stockholder of the corporate plaintiff, was the proprietor of a Dodge dealership in Miami. (Tr. 49). He had been associated with the dealership since 1963, when it was owned by his father. (Tr. 48). He was highly successful, having sold as many as 4,100 new and used cars in a single year. (Tr. 53). That is more than 11 car sales every day for 365 days from a single location. Out of 1,500 Dodge dealers in America, he was one of ten charter members of the Challenger Club, to which one gained entry by selling at least 1,000 new cars a year. (Tr. 51-52). In other words, Mr. Rebhan ranked in the top one

[5] Hebert's location in Homestead was some 24 miles from the site on Coral Way which Gables eventually occupied. (DX-14, Vol. 1, p. 164).

percent of all Dodge dealers in the United States. He had won the Distinguished Dealer Award twelve years in a row and was the only dealer in Dade County to have won that award more than once. (Tr. 52).

During the first four months of 1975, Mr. Rebhan investigated the availability of franchises in foreign makes. (Tr. 760, 794-95). Fiat Motors was contacted and, in mid-April 1975, Fiat's zone manager visited Mr. Rebhan at his Dodge dealership. (Tr. 55-56). Fiat Motors was impressed by Mr. Rebhan's qualifications and by a facility on Coral Way at which Mr. Rebhan said he was prepared to locate his proposed new Fiat dealership. (Tr. 57; DX-4). Fiat Motors explained to Mr. Rebhan that it thought that the new dealership would be a "replacement" for Orange Motors of Coral Gables. (Tr. 279).

About two weeks later, Mr. Rebhan had a second meeting with Fiat Motors. At that meeting, Fiat Motors stated again that it thought that Gables was "replacing Orange Motors of Coral Gables". (Tr. 59-60).

Mr. Rebhan, of course, was aware of the existence of both Autorico and Hebert as Fiat dealers. (Tr. 285-86). During their meetings, Fiat Motors told Mr. Rebhan that Autorico was angry at the appointment of Gables as a Fiat dealer and would do whatever it could to stop Gables from getting a license from the Florida Department of Highway Safety and Motor Vehicles. (Tr. 278, 300).

On May 1, 1975, Fiat Motors telephoned the Department in Tallahassee and advised that it was in the process of signing a franchise agreement with Gables. Fiat Motors asked whether this would result in a protest situation. (Tr. 417-18). The Department responded, " . . . [W]e wouldn't consider the protest." (Tr. 419).

After the telephone call to the Florida Department of Highway Safety and Motor Vehicles, Fiat Motors told Mr. Rebhan that Gables was a "replacement" dealer, and that its "replacement" status was already cleared through the state

agency involved. (Tr. 69). The representation that Gables was a "replacement" dealer is what plaintiffs say was false.

Subsequently, on May 14, 1975, Mr. Rebhan executed separate applications for franchise agreements to sell Fiat and Lancia automobiles (DX-8), Lancia being another make distributed by Fiat Motors. The applications ripened into separate franchise agreements which became effective on June 13, 1975. (PX-32, DX-40).

When Mr. Rebhan was preparing to fill out the license application, one of his employees telephoned the Florida Department of Highway Safety and Motor Vehicles in Tallahassee and spoke to the office of the same state official who had previously advised Fiat Motors that Gables was a "replacement" dealer and that protests would not be entertained. All of Mr. Rebhan's questions were answered, but he did not inquire about whether or not protests might be entertained. (Tr. 300-01, 661-62).

On June 27, 1975, with his franchise agreements in hand, but in violation of Florida law,[6] Mr. Rebhan signed a lease for the Coral Way premises. (PX-28). Although Gables had been formed in May (PX-30A, Note 2), the lease was undertaken by Mr. Rebhan individually. (PX-28).

On July 11, 1975, the Florida Department of Highway Safety and Motor Vehicles wrote Autorico and Hebert and, as provided in Rule 15C-1.08, advised them that they could protest Gables' proposed license to sell Fiats. (PS-26, PX-27). Thereafter, Autorico and Hebert filed protests against the appointment of Gables as a Fiat dealer. (See DX-46).

---

[6] As shown above, Florida law prohibits an applicant from "acquiring building and facilities" in anticipation of a favorable decision. (DX-25). Obviously, the purpose of this prohibition is to prevent the prospective dealer from making a substantial investment before it could be determined whether a protest would arise and delay the opening of a new business. Mr. Rebhan admitted that he knew of this prohibition (DX-9), but he did not comply with it.

At trial, Mr. Rebhan testified that by the end of July he believed that Fiat Motors had intentionally misrepresented to him that Gables was a "replacement" dealer:

> "Q. [Counsel to Fiat Motors] So then it is your testimony that Fiat misrepresented to you about what it told you, that you were a replacement dealer when in fact they knew you weren't; isn't that true?
>
> A. [Mr. Rebhan] Yes.
>
> Q. And you knew that in July of '75, didn't you?
>
> A. At the end of July, '75. I didn't know in the early part.
>
> Q. By July 31, 1975, you knew it?
>
> A. Sure." (Tr. 313-14).

After the protests were lodged, the same state official who had previously advised Fiat Motors that no protests would be entertained decided to convene a hearing and he presided over it. Separate lawyers participated actively on behalf of their respective clients. At this hearing, Mr. Rebhan testified that he regarded himself as a "replacement" dealer (Tr. 286), and Fiat Motors contended that he was qualified to be licensed as a "replacement" dealer. (DX-14). Based on the evidence, the Department determined that Orange Motors of Coral Gables had been "replaced" by the plaintiff dealership, just as Fiat Motors had said it thought would be the case. (PX-31, p.3).[7]

---

[7] The agency also found, in substance, that both Fiat Motors and Gables had acted in good faith.

> "Both Fiat and Coral Gables Imported Motorcars, Inc. believed that the latter would in truth and in fact be no more than a *replacement* for the Orange Motors of Coral Gables dealership cancelled about four months earlier." (PX-31, pp. 2-3) (Emphasis added).
>
> • • •
>
> "Fiat signed a franchise agreement with Coral Gables Imported Motorcars, Inc. in May of 1975, viewing it as no more than a *replacement* of the Orange Motors franchise in Coral Gables as above noted." (PX-31, p.3) (Emphasis added).

The Department order awarding the Fiat license to Gables was dated October 24, 1975. (PX-31). Therefore, the agency hearing confirmed the truth of Fiat's representation that Gables qualified as a "replacement" dealer, but Gables' sales of Fiats had been delayed for 3½ months.

Mr. Rebhan and Gables also alleged that, after the Department invited protests from Autorico and Hebert, Fiat Motors promised to "take care of" any "losses" that Gables might have in operating the dealership until Gables was able to receive Fiats. (Tr. 95, 102, 782). This promise, which Fiat Motors denied making (Tr. 1193), allegedly occurred after a threat by Mr. Rebhan that he would close the dealership. (Tr. 782). The term "losses", however, was never defined, and there was no writing that mentioned a promise to cover Gables' "losses."

It is undisputed, however, that Fiat Motors, in an effort to preserve the dealership, did subsidize Gables. On September 5, 1975, Fiat Motors wrote Gables that it would contribute $30,000 towards Gables' rent and forwarded $16,800 of that amount. (DX-51).

Gables endorsed the check and booked it into its rent account. (PX-24; Tr. 1394). Mr. Rebhan, by letter dated September 16, expressed his "suprise and disappointment" at not receiving the full $30,000 but only an installment; he explained that he and Fiat Motors had made an agreement, which he described in the same way that Fiat Motors had described it in its letter of September 5. (PX-24). Mr. Rebhan's letter also stated that "other arrangements were made to help alleviate some of [his] financial problems." (PX-24). At trial, Mr. Rebhan testified that the "other arrangements" included the agreement to cover all of Gables' "losses". (Tr. 130).

Fiat Motors forwarded the balance of the $30,000 on October 8, 1975. (PX-23). This check, which was endorsed

with a written protest (PX-23), was likewise booked into Gables' rent account. (Tr. 1395).

The oral contract, as Mr. Rebhan described it, had two other provisions: the first was a commitment by Fiat Motors to pay Gables $10,000 for introductory Fiat advertising (Tr. 115, 130); the second was consent for Gables to pay for its initial Fiat parts, costing some $45,000, in twelve monthly installments. (Tr. 115, 130).

Gables had originally paid the full $45,000 when it applied for its Fiat franchise. (Tr. 115). The money was returned by Fiat Motors on August 15, during the period of delay of the license. (DX-48). On October 28, after the issuance of the Department's order awarding Gables the Fiat license, Fiat Motors asked for $15,000 immediately and the balance at the rate of $15,000 per month. (DX-57). Meanwhile, Fiat Motors shipped all the parts. (Tr. 133-34). Its letter of October 28 crossed Mr. Rebhan's letter of October 27, with which he enclosed $15,000 and in which he wrote, "I thought we agreed to a much slower payback, to help out my cash position." (PX-25).

On December 31, 1975, the Fiat franchise agreement expired by its terms. (PX-32, par. 8, p. A-5). But in December Mr. Rebhan signed a second franchise agreement which was of perpetual duration. (PX-33, par. 8, p. A-5).

This second franchise agreement, by its terms, terminated and superseded all prior written or oral agreements pertaining to its subject matter, and it contained a release:

> "SIXTH: This Agreement terminates and supersedes all prior written or oral agreements, if any, between [Fiat Motors] and Dealer, and between Dealer and any former distributor of Fiat passenger cars, parts and products, relating to the subject matter hereof... Except as herein otherwise provided, upon execution of this Agreement and in consideration of the execution thereof by [Fiat Motors],

> *Dealer releases [Fiat Motors] from any and all claims, demands, contracts, and liabilities (including statutory liabilities) of any kind or nature whatsoever, arising from or out of or in connection with any such prior agreements."* (PX-33, p. A-4) (Emphasis added).

Upon the foregoing facts, the trial judge permitted the case to go to the jury, and the jury awarded Gables $325,000 as compensatory damages and awarded Mr. Rebhan $100,000 as compensatory damages. The compensatory awards totalling $425,000 were several multiples of Gables' cumulative loss of $48,448 as of the end of October 1975 (when it received new Fiats to sell), and of Gables' cumulative loss of $66,615 as of December 31, 1975 (when its first Fiat franchise agreement and state license terminated). In addition, the jury piled $166,828 in punitive damages on top of its compensatory awards.

SUMMARY OF ARGUMENT

Petitioners now raise a purported issue under the Seventh Amendment which they did not raise below, even though they had ample opportunity to do so. The Court of Appeals adopted Fiat Motors' argument, made at all stages of this action, that the construction of the release contained in the renewal franchise agreement and the effect of the undisputed facts, showing that petitioners waived their claims for mispresentation, are matters of law and not of fact. The resolution of these matters in favor of Fiat Motors was in full accord with the applicable state law. The treatment of these matters as questions of law was fully consistent with decisions of this Court and Courts of Appeals and did not contravene the Seventh Amendment.

ARGUMENT

THE ELEVENTH CIRCUIT'S REVERSAL OF THE JUDGMENTS RAISES NO COLORABLE SEVENTH AMENDMENT ISSUE AND IS ENTIRELY CONSISTENT WITH THE DECISIONS OF THIS COURT AND THE COURTS OF APPEALS

A. Introduction

Petitioners' invocation of the Seventh Amendment has been contrived in a desperate effort to revive the judgments entered in the district court. The analysis by the Court of Appeals is the same analysis which Fiat Motors urged in its briefs on appeal. Petitioners had ample opportunity to raise their constitutional argument in opposition to Fiat Motors' appeal and subsequently in support of their petition for rehearing. In raising this issue for the first time in this Court, petitioners are attempting to obscure the Court of Appeals' clear view that the judgments were contrary to law.

B. The Eleventh Circuit Correctly Ruled That, as a Matter of Law, Fiat Motors had Established its Affirmative Defenses of Release and Waiver

Fiat Motors has maintained, since the virtual inception of this action, that the release contained in the second franchise agreement, clearly and unambiguously, and as a matter of law, barred all of petitioners' claims, and that, in any event, the execution of the second agreement constituted a waiver, as a matter of law, of their misrepresentation claims. In its disposition of this action, the Court of Appeals merely adopted positions which Fiat Motors asserted in its first motion for summary judgment (filed more than three years prior to trial), in its second motion for summary judgment (made shortly before trial), in its motions for directed verdicts at trial, and in its post-trial motions.

The release recited in part that "Dealer releases [Fiat Motors] from any and all claims, demands, contracts, and liabilities . . . arising from or out of or in connection with" all

prior written or oral agreements which relate to the subject matter of the renewal franchise agreement. The Eleventh Circuit first determined that, under the applicable New York law, "[w]here the language of the general release is unmistakenly clear, . . . the intent of the parties can often be discerned from the release itself"; and that "unless fraud, duress or illegality is established, the language of a voluntary release will be given its full effect". 673 F.2d at 1238. The court then reviewed the language of the release, in light of other relevant provisions of the franchise agreement and the claims which were being asserted, and held that the release was sufficient to bar all of appellee Gables' claims. 673 F.2d. at 1239, 680 F.2d at 105. The court, therefore, held: (1) that the effect of an unambiguous release is a question of law to be determined by the court; and (2) that, "when the particular language of the [Gables] release is viewed in the context of the franchise relationship between the parties", 673 F.2d at 1239, Gables' claims were barred as a matter of law.

Other Courts of Appeals have similarly treated the effect of a release as a question of law, and have ruled, as a matter of law, that the defendant was entitled to judgment. *Three Rivers Motors Co. v. Ford Motor Co.*, 522 F.2d 885 (3d Cir. 1975) (applying Pennsylvania law; motion to dismiss granted); *Redel's Inc. v. General Electric Co.*, 498 F.2d 95 (5th Cir. 1974) (applying federal law; motion for summary judgment granted in part); *Fabert Motors, Inc. v. Ford Motor Co.*, 355 F.2d 888 (7th Cir. 1966) (citing federal precedents; motion for summary judgment granted); *Duffy Theatres, Inc.* v. *Griffith Consol. Theatres, Inc.*, 208 F.2d 316 (10th Cir. 1953) (citing federal and state precedents; motion for summary judgment granted); *see also, LaBeach v. Beatrice Foods Co.*, 461 F. Supp. 152 (S.D.N.Y. 1978) (applying Illinois law; motion for summary judgment granted). As the Fifth Circuit said of a similar unambiguous release, the language of the second franchise agreement "without more, permits the intent of the parties as to the scope of the release to be readily ascertained without submission to the trier of fact", for "[i]n the complete absence of ambiguity, the general release provision . . . permits no jury

consideration of extrinsic evidence as to its scope." *Redel's Inc. v. General Electric Co., supra,* at 100.

Petitioners argued to the Court of Appeals that "the release was ineffective because of the alleged continuing fraud surrounding the execution of the second agreement and because the agreement was executed under duress". 673 F.2d at 1238. The Court of Appeals determined that, as a matter of law, neither contention could undermine the conclusive effect of the release.

Petitioners' contention of "duress" was based solely upon statements made by a Fiat Motors representative to the effect that execution of the second agreement was necessary for Gables to continue operating as a Fiat dealer. After reviewing the applicable law, the Court of Appeals stated:

> "... it was apparent to both parties from the time the original agreement was executed, that a renewal agreement would be forthcoming in December of 1975. While it is true that [Gables] would have been unable to continue receiving cars and parts if they had not signed the second agreement, this sort of allegation alone has uniformly been held insufficient to establish duress". 673 F.2d at 1239.

Other Federal courts have similarly given effect to a release when, as a matter of law, "duress" could not be established. *Three Rivers Motors Co. v. Ford Motor Co., supra,* at 893-94 ("Assuming for the moment that the facts offered to demonstrate duress are as alleged by Three Rivers, they fail as a matter of law to constitute grounds for setting aside the release... Duress is not established merely by showing that the release was given under pressure of the financial circumstances disclosed here."); *Fabert Motors, Inc. v. Ford Motor Co., supra,* at 891 ("Economic coercion is not established by showing that the release was given under pressure of financial circumstances under threat of Ford's having recourse to an action Ford was legally entitled to take."); *Kohen v. H.S. Crocker Co.,* 260 F.2d 790, 792 (5th Cir. 1958); *LaBeach v. Beatrice Foods Co., supra,* at 157-58.

Petitioners' further contention of a "continuing fraud" was based solely upon the representations and promises which Fiat Motors allegedly made during the summer of 1975. The court below found that, when the release was executed in the following December, Gables "must have been aware of the alleged misrepresentations" and that Gables "could not have been reasonably relying upon...alleged promises several months after" they had been "unequivocally" disavowed in written communications. 673 F.2d at 1239.[8]

The Eleventh Circuit's reasoning with respect to petitioners' knowledge of the alleged misrepresentation was based on undisputed facts: "It is clear...that [Gables] must have been aware of the alleged mispresentations concerning Gables' 'replacement' status in July of 1975 when the protests were lodged. Indeed, Rebhan admitted as much in his testimony at trial." 673 F.2d at 1239. The testimony referred to by the court is the following:

> "Q. [Counsel to Fiat Motors] So then it is your testimony that Fiat misrepresented to you about what it told you, that you were a replacement dealer when in fact they knew you weren't; isn't that true?
>
> A. [Mr. Rebhan] Yes.
>
> Q. And you knew that in July of '75, didn't you?
>
> A. At the end of July, '75. I didn't know in the early part.
>
> Q. By July 31, 1975, you knew it?
>
> A. Sure." (Tr. 313-14).

---

[8] The court wrote: "It is . . . obvious that [Gables] could not have been reasonably relying upon Fiat Motors' alleged promises several months after the license was awarded when Fiat Motors had unequivocally indicated that its $30,000 payment was in full satisfaction of its promises and had imposed a specific schedule for monthly payments on parts thereafter". 673 F.2d at 1239. (Footnote omitted). The relevant written correspondence, which speaks for itself, is more fully described at pages 9-10 above and at 673 F.2d 1237.

This testimony demonstrated that petitioners had actual knowledge of the intentional nature of Fiat Motors' alleged mispresentation several months prior to the execution of the second franchise agreement.

The next day, on re-direct examination, Mr. Rebhan gave the following testimony:

> "Q. [Counsel to petitioners] Mr. Rebhan, when did you realize that there was any intentional mispresentation on the part of Fiat?
>
> A. That was in March of 1976." (Tr. 464).

The Eleventh Circuit noted this testimony, but found it to be "both contradictory and self-serving". 673 F.2d at 1239 n.6.[9] Such testimony was not sufficient to create a jury question under the standard applied in the Eleventh Circuit:

> "Under *Boeing Co. v. Shipman*, we must not weigh the credibility of witnesses . . . But completely self-serving testimony, unsupported by other evidence and in the teeth of universal experience, will not support a jury verdict." *Ralston Purina Co. v. Hobson*, 554 F.2d 725, 728-29 (5th Cir. 1977) (Motion for judgment n.o.v. granted).[10]
>
> • • •
>
> "While neither we nor the trial judge may make credibility choices, neither court is required to accept, as credible, unsupported self-serving testimony that flies in the teeth of unimpeachable contradictory evidence and universal experience." [citations omitted] *New England Merchants National Bank v. Rosenfield*, 679 F.2d 467, 473 (5th Cir. 1982) (Directed verdict granted).

---

[9] The court also found "this testimony to be irrelevant under circumstances where promises were made and disavowed several months prior to the execution of the release." *Id.*

[10] *Boeing Co.* v. *Shipman*, 411 F.2d 365 (5th Cir. 1969) is followed in the Eleventh Circuit. *E.g., Holmes* v. *Oxford Chemicals, Inc.*, 672 F.2d 854, 855 (11th Cir. 1982) (Tuttle, J.).

This Court itself has refused to give any probative value to a plaintiff's testimony which "falls of its own weight." *United States v. Generes,* 405 U.S. 93, 107 (1972). That case was a civil tax action in which this Court established the rule that, in determining whether a bad debt has sufficient relationship to a taxpayer's business, the taxpayer must show that his "dominant" motivation was business-related. The Court held, on a review of the record, that the government was entitled to judgment n.o.v.: "[T]he only real evidence offered by the taxpayer bearing upon motivation was his own testimony . . . The statements obviously are self-serving. In addition, standing alone, they do not bear the light of analysis." *Id.* at 106.

The same reasoning led to the Eleventh Circuit's holding that, as a matter of law, both petitioners had waived their misrepresentation claims. The applicable Florida law was summarized by the court as follows:

> "Under certain circumstances, Florida courts have found that claims based on fraud have been waived by the subsequent execution of an agreement respecting the same subject matter as the alleged fraudulent transaction. As these cases make clear, however, waiver will not be found unless the defrauded party had actual or imputed knowledge of the facts constituting the alleged fraud at the time the subsequent agreement was made." [citations omitted] 673 F.2d at 1240.

Therefore, the test for waiver of a mispresentation is essentially objective, and Florida state courts have routinely found waiver of a fraud in cases decided either on the pleadings or otherwise on motion without a trial. *E.g., Benn v. Key West Propane Gas Corp.,* 72 So.2d 910 (Fla. 1954); *Harpold v. Stock,* 65 So.2d 477 (Fla. 1953); *Padgett v. Lewis,* 54 Fla. 177, 45 So. 29 (1907); *Price v. Airlift International, Inc.,* 181 So.2d 549 (Fla. 3d DCA 1966). Similarly, the Eleventh Circuit determined as a matter of law that "the appellees knew or should reasonably have known all the pertinent facts constituting the alleged fraudulent activities at the time the second franchise agreement was executed." 673 F.2d at 1240.

The Eleventh Circuit properly determined that, under the law of New York,[11] the effect of the release was a question of law, and that, as a matter of law, the release barred all of petitioner Gables' claims. Similarly, the court properly determined that, under Florida law, the test for waiver of a mispresentation is essentially objective, and that, as a matter of law, both petitioners had waived their mispresentation claims. In this diversity action, the Eleventh Circuit ruled as the courts of New York and Florida, respectively, would have ruled.

C. The Eleventh Circuit's Disposition of This Action Does Not Raise any Colorable Seventh Amendment Issue.

This Court has declared that it is appropriate for a Court of Appeals to order entry of judgment for the defendant if a verdict for the plaintiff is contrary to dispositive issues of law:

> "There are . . . situations where the defendant's grounds for setting aside the jury's verdict raise. . . dispositive issues of law which, if resolved in defendant's favor, must necessarily terminate the litigation . . . . In such situations, . . . there can be no reason whatsoever to prevent the court of appeals from ordering dismissal of the action or the entry of judgment for the defendant." *Neely v. Martin K. Eby Construction Co.*, 386 U.S. 317, 327 (1967).[12]

Petitioners have failed to establish that the standard of review applied by the Eleventh Circuit is inconsistent with that applied by any other federal appellate court. In the words of the Fourth Circuit taken from an opinion cited by petitioners: Petitioners "only state the obvious when [they] assert that [the court is] without power to redetermine facts found by the jury,

---

[11] After noting that "the laws concerning the construction of a general release are more or less uniform among the states", the court held that New York law applied to the effect of the release before it. 673 F.2d at 1238.

[12] Petitioners' reliance on *Pullman-Standard* v. *Swint*, ___ U.S. ___, 102 S.Ct. 1781 (1982) (Pet. at 19 n.30), is misplaced. This Court stated in that case that the dispositive question was "not a question of law and not a mixed question of law and fact." 102 S.Ct. at 1789.

and that [the court's] function is strictly limited to determining the legal question of whether there is any substantial evidence to allow the case to go to the jury." [citations omitted] *Bryant v. Liberty Mutual Insurance Co.*, 407 F.2d 576, 578 (4th Cir. 1968).

The standard of review established in *Boeing Co. v. Shipman*, 411 F.2d 365 (5th Cir. 1969), and subsequently adopted by the Eleventh Circuit, is as follows:

> "On motions for directed verdict and for judgment notwithstanding the verdict the Court should consider all of the evidence—not just that evidence which supports the non-mover's case—but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper. On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motion should be denied, and the case submitted to the jury. A mere scintilla of evidence is insufficient to present a question for the jury. *The motions for directed verdict and judgment n.o.v. should not be decided by which side has the better of the case, nor should they be granted only when there is a complete absence of probative facts to support a jury verdict. There must be a conflict in substantial evidence to create a jury question.* However, it is the function of the jury as the traditional finder of facts, and not the Court, to weigh conflicting evidence and inferences, and determine the credibility of witnesses." *Id.* at 374-75. (Emphasis added; footnote omitted).[13]

---

[13] In an attempt to suggest a conflict where none in fact exists, petitioners cite *Boeing* for the proposition that a jury verdict may be overturned only "when there is a 'complete absence' of *probative* facts to support the verdict." (Pet. at 27; emphasis added). However, it is

Finally, petitioners have established no colorable Seventh Amendment issue. The Amendment provides in pertinent part that "no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law". It is clear from the language of the Amendment and the authorities cited by petitioners that questions of law are to be determined by the court, *Dimick v. Schiedt*, 293 U.S. 474 (1935), and that the Amendment does not preclude judgment for a party who establishes either the existence or absence of liability "as a matter of law". *Atlantic and Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355 (1962).

It is well-settled that neither a directed verdict nor judgment n.o.v. violates the Seventh Amendment. *Galloway v. United States*, 319 U.S. 372 (1943); *Neely v. Martin K. Eby Construction Co., supra*, at 321. Moreover, "[a]s far as the Seventh Amendment's right to jury trial is concerned, there is no greater restriction on the province of the jury when an appellate court enters judgment n.o.v. than when a trial court does; consequently, there is no constitutional bar to an appellate court granting judgment n.o.v." *Id.* at 322.

Neither petitioners' fourteen-page "Statement of the Facts", nor their reproduction of 109 pages of trial testimony, can convert the Eleventh Circuit's determinations of law into findings of fact, nor can they create a Seventh Amendment issue where none exists. The Eleventh Circuit's disposition of this action was consistent with the applicable state law, with the standard of review applied in that circuit, and with the prior decisions of this Court.

---

clear from the language in *Boeing* which has been italicized above that there is no such "complete absence" test in the Fifth Circuit. In any event, as demonstrated above, there was a "complete absence" of any *probative* evidence to refute the uncontroverted facts upon which the Court of Appeals based its decision in the present case.

CONCLUSION

Fiat Motors respectfully requests that the petition for a writ of certiorari be denied.

December 3, 1982

Respectfully submitted,

WOODROW M. MELVIN, JR.

(Counsel of Record)
One Biscayne Tower, Suite 2020
Miami, Florida 33131
(305) 371-6262

Attorney for Respondent
Fiat Motors of North America, Inc.

ROBERT I. FISHER
JAMES M. BRACHMAN
JACK M. BATTAGLIA

Of Counsel

TABLE OF CONTENTS

	Appendix Page
Appendix A—Original Opinion of Court of Appeals, April 23, 1982	A-1
Appendix B—Opinion of Court of Appeals on Plaintiffs' Petition for Rehearing, July 9, 1982	B-1

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 80-5787 Decided April 23, 1982

CORAL GABLES IMPORTED MOTORCARS, INC., et al.,
Plaintiffs-Appellees,

V.

FIAT MOTORS OF NORTH AMERICA, INC.,
Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

Before:

TUTTLE, KRAVITCH and JOHNSON, *Circuit Judges*

TUTTLE, Circuit Judge:

This diversity case involves various tort and contract claims arising from certain representations and promises made by appellant Fiat Motors of North America, Inc. (Fiat Motors) to appellees Coral Gables Imported Motorcars, Inc. and Charles Rebhan in connection with the execution of a Fiat franchise agreement. After trial by jury, the district court entered judgments against Fiat Motors in the total amount of $591,828.00. On appeal Fiat Motors raises numerous claims of error. Finding one of these claims to be dispositive, we reverse for the reasons which follow.

I. FACTS

In 1974 Fiat Motors had two dealer franchisees in Dade County, Florida. One of these dealerships was located in Coral Gables (central Dade County) and the other was located in Miami (north Dade County). Dissatisfied with these relationships, Fiat Motors terminated its franchises in early 1975 and appointed two new dealers, Hebert Oldsmobile in Homestead (south Dade County) and Autorico, Inc. in Miami. Apparently Fiat Motors was interested in establishing a third franchisee in central Dade County. And Rebhan, the owner of one of the most successful Dodge dealerships in the United States, was interested in acquiring a Fiat franchise for the Coral Gables area. In April of 1975, Fiat Motors and Rebhan began negotiations for a franchise agreement. At this time Rebhan, who later incorporated under the name of Coral Gables Imported Motorcars, Inc. (Gables), had an oral commitment to lease land in the Coral Gables area. During the negotiations, Fiat Motors characterized the proposed new franchise as a "replacement" for the central Dade County franchise which it had terminated earlier that year. More significantly on May 1, 1975, after being advised by the Florida Department of Highway Safety and Motor Vehicles (Department) that it would not entertain protests regarding Gables' appointment,

Fiat Motors informed Gables that its status as a "replacement dealer" had been cleared through the Department.[1]

In the context of Florida's statutory procedure for licensing motor vehicle dealers, the designation "replacement dealer" has special meaning. Section 320.642 provides:

> The department shall deny an application for a motor vehicle dealer license in any community or territory where the licensee's presently licensed franchised motor vehicle dealer or dealers have complied with licensee's agreements and are providing adequate representation in the community or territory for such licensee. The burden of proof in showing inadequate representation shall be on the licensee.

Fla.Stat. § 320.642 (1979). In implementing this statutory provision, the Department has promulgated Rule 15C-1.08 which affords currently licensed dealers an opportunity to protest the issuance of a new license. This Rule also provides that the Department may convene a hearing if necessary to determine whether the application for a license should be granted or denied according to the criteria set forth in section 320.642. In the case of an application by a "replacement dealer," however, the Department apparently often finds it unnecessary to entertain protests since no additional competition will arise by virtue of a new licensee's replacement of a former dealer. In this situation, a licensing decision can be made without the substantial delays which otherwise result from the hearing process.

On May 14, 1975, Gables, allegedly relying on Fiat Motors' representation that it would be treated as a replacement dealer by the Department, executed an application for a franchise agreement. This agreement became effective on June 13, 1975. By letter of June 25, 1975, Fiat Motors formally

---

1. It is apparent, however, that both Fiat Motors and Gables were aware of the existence of the other two Fiat dealerships in Dade County. Moreover, Fiat Motors asserts that one of Rebhan's employees had a similar conversation with a Department representative, but that Gables made no attempt to confirm his "replacement" dealer status with the Director of the Department.

advised the Department that it was appointing Gables as a replacement dealer for its former central Dade County franchise. On June 27, 1975, Rebhan executed a ten year lease agreement for the Coral Gables premises. He then began hiring and training salesmen, mechanics and other employees. No Fiat cars or parts could be shipped to Gables, however, until its license was granted. On July 11, 1975, the Department notified the other Fiat dealerships in Dade County of their right to protest Gables' application. Thereafter Hebert Oldsmobile and Autorico, Inc. filed protests against the appointment of Gables as a Fiat dealer. The same state official who had previously informed Fiat Motors that protests would not be entertained then convened a hearing with respect to Gables' license application.

When Rebhan first learned about the protests in July of 1975, he contacted Dewey Manning, President of Fiat Motors. Rebhan alleged that during this conversation, Manning agreed to pay Gables $10,000 for a grand opening, to defer the payments for parts, and to take care of any losses Gables might have in operating the dealership until the Fiats arrived. Rebhan asserted that in reliance on these promises, he made every effort to keep the dealership open by selling used cars and Lancias, for which a license has been issued without protest. Although Fiat Motors contested the provisions of this oral contract at trial, it did admit to returning Gables' initial payment for its Fiat parts pending the licensing determination. Moreover, by letter dated September 5, 1975, Fiat Motors agreed to contribute $30,000 towards Gables' rental payments. Rebhan responded to this letter on September 16, 1975, by asserting that he thought other financial arrangements had been made. Fiat Motors subsequently forwarded two checks totaling $30,000 to Gables in September and October of 1975. The letter enclosing the second check stated: "This completes the program as outlined in previous correspondence." Both of these checks were endorsed by Gables under written protest and applied to Gables' rent account.

On October 24, 1975, the Department entered an order granting Gables' license as a Fiat dealer.[2] After the license was awarded, Gables began receiving Fiat cars and parts. By letter of October 28, 1975, Fiat Motors requested an immediate $15,000 payment on the parts with the remainder to be paid in $15,000 monthly installments. In forwarding his initial $15,000 payment, Rebhan indicated that he thought they had agreed to a much slower payback. Apparently no other conversations concerning Fiat Motors' alleged promises occurred during the next two months.

Gables' franchise agreement expired by its terms on December 31, 1975. On December 18, 1975, Gables executed a second franchise agreement which contained a release provision. Although Gables had been selling Fiats for several months, it continued to suffer financial losses through July of 1976 when the franchise was terminated. In March of 1976, Gables and Rebhan sued Fiat Motors alleging fraud, breach of an oral contract, promissory estoppel and negligence. Fiat Motors' motion for summary judgment was denied and the case proceeded to trial. The district court also denied Fiat Motors' motion for directed verdict and charged the jury on each of the four claims presented by Gables and Rebhan. The jury entered a general verdict in favor of Gables and Rebhan awarding them $425,000 as compensatory damages and $166,828 in punitive damages. The district court denied Fiat Motors' motion for judgment notwithstanding the verdict. Fiat Motors then brought this appeal raising numerous claims of error.

II. RELEASE AND WAIVER

The second franchise agreement executed by the parties in December of 1975 contained the following release:

> SIXTH: This Agreement terminates and supersedes all prior written or oral agreements, if any, between FDI and

2. In its order, the Department found that both Fiat Motors and Gables had acted under the belief that Gables would in fact be no more than a replacement dealer for the former Dade County franchise. It further found that the criteria for denying a license in section 320.642 had not been established.

> Dealer, and between Dealer and any former distributor of Fiat passenger cars, parts and products, relating to the subject matter hereof, except with respect to any trade indebtedness which may be owing to either FDI or Dealer to the other, and except that this Agreement shall not operate to cancel any of Dealer's unfilled orders with FDI for any Fiat passenger cars, parts and products placed with FDI pursuant to the provisions of any sales agreement terminated or superseded by this Agreement. Except as herein otherwise provided, upon execution of this Agreement and in consideration of the execution thereof by FDI, Dealer releases FDI from any and all claims, demands, contracts, and liabilities (including statutory liabilities) of any kind or nature whatsoever, arising from or out of or in connection with any such prior agreements.

Fiat Motors submits that this release should be construed as a matter of law to extinguish all of the claims raised by Gables and Rebhan. Thus it asserts that the trial court erred in submitting the case to the jury. On the other hand, Gables and Rebhan contend that the release was ineffective because of the alleged continuing fraud surrounding the execution of the second agreement and because the agreement was executed under duress.

Although the laws concerning the construction of a general release are more or less uniform among the states, we must begin our analysis of this agreement by focusing on the appropriate state law to be applied. The agreement itself provides that it is to be "governed by, and construed according to the laws of New York." In order to determine whether this choice of law provision is to be given effect, we look to the substantive laws, including the conflict of law rules, of the forum state, Florida. *E.g., Klaxton v. Stenor Electric Manufacturing Co.*, 313 U.S. 487, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941); *Charles L. Bowman & Co. v. Erwin*, 468 F.2d 1293 (5th Cir. 1972). The parties' agreement as to which law shall govern the construction of a contract would be recognized under Florida law, unless the chosen law contravenes the public policy of

Florida. *See, e.g., Wilkinson v. Manpower, Inc.*, 531 F.2d 712 (5th Cir. 1976); *Hirsch v. Hirsch*, 309 So.2d 47 (Fla. App.1975); *Davis v. Ebsco Industries, Inc.*, 150 So.2d 460 (Fla.App.1963); *cf. Boat Town U.S.A., Inc. v. Mercury Marine Division of Brunswick Corp.*, 364 So.2d 15 (Fla.App.1978) (drawing a distinction between clauses which provide that contracts are to be interpreted according to, rather than governed by, the laws of another state). Since New York law concerning the scope and effect of general releases does not contravene any articulated public policy of Florida, we find that New York law should be applied to this franchise agreement.[3]

Under New York the law construction of a general release is governed by principles of contract law and thus the intention of the parties is the controlling issue. *E.g., Gordon v. Vincent Youmans, Inc.*, 358 F.2d 261 (2d Cir. 1965) (applying New York law); *Mangini v. McClurg*, 24 N.Y.2d 556, 249 N.E.2d 386, 301 N.Y.S.2d 508 (1969); *Mt. Read Terminal, Inc. v. LeChase Construction Corp.*, 58 A.D.2d 1034, 396 N.Y.S.2d 959 (1977). The scope of the release must of course be determined in the context of the particular controversy at issue.[4] Where the ianguage of the general release is unmistakenly clear, however, the intent of the parties can often be discerned from the release itself. *E.g., In re Schaefer*, 18 N.Y.2d 314, 221 N.E.2d 538, 274 N.Y.S.2d 869 (1966); *Single v. Whitmore*, 307 N.Y. 575, 122 N.E.2d 918 (N.Y.1954); *Powell v. Oman Construction Co.*, 25 A.D.2d 566, 267 N.Y.S.2d 862 (App.Div.1966). Thus, unless fraud, duress or illegality is established, the language of a voluntary release will be given its

3. The appellees assert that Fiat Motors' failure to comply with Rule 44.1 of the Federal Rules of Civil Procedure precludes the application of New York law to this release. By its own terms, Rule 44.1 requires only that notice be given concerning the "law of a foreign country." Fed.Rules Civ.Proc. 44.1. Moreover, Fiat Motors relied on New York law in its original motion for summary judgment. Finally, we note that a federal court sitting in diversity is required to take judicial notice of the laws of every state. *See McCormick on Evidence* § 355 (2d ed. 1972).

4. Under New York law, a general release may be raised as a defense to claims for both tort and contract liability. *See, e.g., Krichmar v. Krichmar*, 42 N.Y.2d 858, 366 N.E.2d 863, 397 N.Y.S.2d 775 (1977); *Mt. Read Terminal, Inc. v. LeChase Constr. Corp.*, 58 A.D.2d 1034, 396 N.E.2d 959 (1977).

full effect. *See Korn v. Franchard Corp.*, 388 F.Supp. 1326, 1328 n.3 (S.D.N.Y.1975); *Mangini v. McClurg, supra.*

Subject to certain specified exceptions, the release provision in the instant case terminates all prior written or oral agreements which relate to the subject matter of the franchise. It then releases Fiat Motors from "any and all claims, demands, contracts, and liabilities . . . arising from or out of or in connection with any such prior agreements." It cannot seriously be disputed that the representations and promises allegedly made by Fiat Motors are related to the subject matter covered by this comprehensive franchise agreement.[5] Moreover, the record clearly indicates that all of the claims raised in this suit relate to the various oral and written agreements made in the summer of 1975, several months prior to the execution of the second franchise agreement which contained the release provision. If the appellees had intended to reserve any of their claims against Fiat Motors, they should have added words of reservation. *In re Schaefer, supra.* Thus, when the particular language of the release is viewed in the context of the franchise relationship between the parties, we find that the release was sufficient to bar all of the appellees' claims.

The appellees contend, however, that they should be allowed to rescind the second franchise agreement because of the alleged continuing fraud perpetrated upon them at the time the agreement was executed. No independent fraudulent activities on the part of Fiat Motors are alleged to have occurred in December of 1975 when the agreement was executed. Rather, appellees base their claim of "continuing fraud" on the representations and promises made by Fiat Motors during the summer of 1975. Appellees assert that since they did not realize the intentional nature of Fiat Motors' fraudulent conduct until March of 1976, their claims could not have effectively been released in December of 1975. It is clear, however, that the appellees must have been aware of the

5. We note that the franchise agreement specifically covers advertising costs, payment schedules for parts, and releases Fiat Motors from any liability for expenditures incurred by the dealer in the performance of its contractual obligations.

alleged misrepresentations concerning Gables' "replacement" status in July of 1975 when the protests were lodged. Indeed, Rebhan admitted as much in his testimony at trial. It is equally obvious that appellees could not have been reasonably relying upon Fiat Motors' alleged promises several months after the license was awarded when Fiat Motors had unequivocally indicated that its $30,000 payment was in full satisfaction of its promises and had imposed a specific schedule for monthly payments on parts thereafter.[6] In the absence of any allegation that Fiat Motors either renewed its old promises or made new ones at the time the second agreement was executed, we find no basis for appellees' claim that the release was tainted by continuing fraud.

Similarly, we are unable to conclude that the franchise agreement was the product of duress. Under New York law, a release is not voidable on grounds of economic duress unless it is shown that a threat was unlawfully made, causing an involuntary acceptance of the contract terms under circumstances where no alternative was available. Mere hard bargaining positions or the pressure of financial circumstances is not sufficient. *See, e.g., Gulf & Western Corp. v. Craftique Productions, Inc.*, 523 F.Supp. 603 (S.D.N.Y.1981); *Business Incentives Co., Inc. v. Sony Corp. of America*, 397 F.Supp. 63 (S.D.N.Y.1975); *Stewart M. Muller Construction Co. v. New York Telephone Co.*, 40 N.Y.2d 955, 359 N.E.2d 328, 390 N.Y.S.2d 817 (1976). In the instant case, it was apparent to both parties from the time the original agreement was executed, that a renewal agreement would be forthcoming in December of 1975. While it is true that appellees would have been unable to continue receiving cars and parts if they had not signed the second agreement, this sort of allegation alone has uniformly been held insufficient to establish duress. *See, e.g., Three Rivers*

6. Rebhan's testimony that he was unaware of the intentional nature of Fiat Motors' misrepresentations until March of 1976 is both contradictory and self-serving. Moreover, we find this testimony to be irrelevant under circumstances where promises were made and disavowed several months prior to the execution of the release.

Motors Co. v. Ford Motor Co., 522 F.2d 885 (3d Cir. 1975); *Kohen v. H.S. Crocker Co.*, 260 F.2d 790 (5th Cir. 1958); *La Beach v. Beatrice Foods Co.*, 461 F.Supp. 152 (S.D.N.Y.1978). 66 *Am.Jur.2d, Release* § 26 (1973). To hold otherwise would be tantamount to finding that the mere renewal of a franchise agreement, under circumstances where a potential dispute between the parties exists, is sufficient to establish a claim of duress.

Finally, we note that regardless of the effect of the release, an alternative basis for disposing of the appellee's fraud claims is provided by Florida's common law of waiver. Under certain circumstances, Florida courts have found that claims based on fraud have been waived by the subsequent execution of an agreement respecting the same subject matter as the alleged fraudulent transaction. *See, e.g., Bissett v. Ply-Gem Industries, Inc.*, 533 F.2d 142 (5th Cir. 1976); *Benn v. Key West Propane Gas Corp.*, 72 So.2d 910 (Fla.1954); *Harpold v. Stock*, 65 So.2d 477 (Fla.1953), 27 *Fla.Jur.2d, Fraud and Deceit* § 81 (1981). As these cases make clear, however, waiver will not be found unless the defrauded party had actual or imputed knowledge of the facts constituting the alleged fraud at the time the subsequent agreement was made. *Bissett v. Ply-Gem Industries, Inc., supra.* For the reasons previously described, we find that the appellees knew or should reasonably have known all the pertinent facts constituting the alleged fraudulent activities at the time the second franchise agreement was executed. Thus, we hold that the execution of the second franchise agreement amounted to a waiver of the appellees' claims based on fraud.

Because we hold that the appellees' claims were effectively precluded by the release and waiver, we find it unnecessary to discuss the other issues raised by Fiat Motors in this appeal. Accordingly, the judgments are REVERSED and the case is REMANDED for further proceedings not inconsistent with this opinion.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 80-5787 **Decided July 9, 1982**

CORAL GABLES IMPORTED MOTORCARS, INC., et al.,

Plaintiffs-Appellees,

V.

FIAT MOTORS OF NORTH AMERICA, INC.,

Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

ON PETITION FOR REHEARING

Before:

TUTTLE, KRAVITCH and JOHNSON, *Circuit Judges*

PER CURIAM:

In their petition for rehearing, appellees point out that we incorrectly refer to both appellees in our discussion of the release. Accordingly, we find that our original opinion, 673 F.2d 1234, should be modified as follows. The last sentence of the first paragraph should be deleted. All references to appellees in the first six paragraphs of Part II of the opinion are hereby changed to read "appellee Gables." The last paragraph of the opinion should be changed to read:

Because we hold that appellee Gables' claims were effectively precluded by the release and waiver, we REVERSE the judgment in the amount of $491,827.00 entered in favor of Gables. Because we hold that Rebhan waived his claim of fraudulent misrepresentation, we REVERSE the judgment in the amount of $100,001.00 entered in favor of Rebhan, and REMAND to the district court for proceedings consistent with this opinion.

In ruling on this petition for rehearing, we have reviewed Fiat's allegations of error concerning claims other than fraud and find them to be without merit. To the extent of the above changes the petition for rehearing is GRANTED. In all other respects the petition is DENIED.